Supreme Court of Vermont.

WASHINGTON FORD *v.* AUGUSTUS FLINT ET AL.

A. made a deed by which he granted and conveyed certain lands to his daughter B. "during her lifetime, and to her eldest son, which shall be living at her decease, and to his eldest son at his decease, and so on from eldest son to eldest son to the latest generation," *habendum* to B. "and to her heirs as aforesaid." This deed he never delivered, but after his death it was found in his papers and delivered by his administrator to B., who went into possession under it, and afterwards made a deed in fee for the same premises to C., who held by himself and his grantees in fee for thirty-six years. *Held*,

1. That B. took a life estate only.

2. That her eldest son living at her decease took a fee tail directly from the original grantor.

3. That the only title B. took and conveyed and C. took and held under B. was under color of the deed from A., and therefore both B. and C. and the subsequent purchasers under them were estopped from disputing the validity of A.'s deed, because it was not delivered in the lifetime of the grantor.

4. That C. took with notice of the title of B.'s eldest son, and his possession was not adverse so long as B. lived.

5. That the deed from A. to B. being on record, was notice to all subsequent purchasers of the extent of B.'s title.

Fifield, for plaintiff.

Clark & Rowell, for defendants.

The opinion of the court was delivered by

BARRETT, J.—This is ejectment for a parcel of land, part of the home farm formerly owned by Nathaniel Spear, who died in January 1826. On the 15th day of November 1819, he made and executed deeds of separate parcels of said farm to each of several of his children, but kept said deeds in his own possession until his death. The day after his death, one of his sons, who was subsequently appointed administrator of his estate, delivered said deeds to the respective grantees therein named. One of said deeds, covering and conveying the land sued for in this writ, was to Aseneth Ford, a daughter of said Nathaniel, in and by which he did "give, grant, convey, and confirm unto her, the said Aseneth, during her lifetime, and to her eldest son which shall be living at her decease, and to his eldest son at his decease, and so on from eldest son to eldest son, to the latest generation," &c.: *habendum* "unto said Aseneth and to

her heirs as aforesaid," &c., followed by the usual covenants of warranty.

It appeared that said Aseneth and her husband, in the spring of 1826—the spring next after the January in which her father died—went into possession of said premises under claim of title by virtue of said deed from Nathaniel Spear, and remained in possession until 1829, when she sold and conveyed in fee said premises to Brown by deed of warranty, who then took possession and held till he conveyed in fee by deed of warranty; and after that the premises passed by like deeds of warranty through several successive owners to the present defendants, each of whom took possession at the time of his respective deed, and held till he conveyed as aforesaid, and the defendants are now in possession. The said Aseneth died March 1st 1865, her husband still surviving. The present plaintiff is her eldest son living at the time of her decease. The plaintiff claims title in himself by virtue of said deed of Nathaniel Spear. One ground of defence is, that that deed created an *estate tail*, or a *conditional fee* at common law, unaffected by the statute *de Donis;* and that the entail was barred by the deed of warranty in fee of Aseneth to Brown, and that Brown took an absolute title in fee under that deed. The plaintiff, on the other hand, claims that his mother took only an estate for life, and, on her death, that he took in remainder, and is entitled to hold according to the form of the gift—the title thereafter to go to such persons, and in such manner, as the laws of this state shall warrant.

The *conditional fee* or *estate tail* at common law, before the statute *de Donis*, was created by a conveyance to the donee of an estate that would have been an absolute *fee simple*, were it not limited by the condition, viz., of issue being born, who, according to the form of the gift, were to take by inheritance from the donee of the conditional fee. In conformity with this idea, all the special rules were devised, adopted, and applied, that governed the rights of parties in respect to such estates, as the right of the donee on the birth of the prescribed issue to convey an absolute fee simple, and thus bar the issue of the right to take, as well as the donor of the right to the reversion. Of course the donee could not convey such *absolute fee simple*, unless it had been vested in him by the form and effect of the gift, contingent at first, to be sure, upon the performance of the condition by the

birth of the prescribed issue. "It was a *fee simple* on condition that the donee had issue:" 2 Bl. Com. 110. By the gift, the entire title passed from the donor, subject only to the possibility of reverter. During the life of the donee, the property and estate were vested in the donee beyond all power of the donor to affect the character of the estate. Upon the birth of issue, the absolute and unqualified disposition of it was in the *donee;* and if such donee made a conveyance of the fee, the grantee took such fee as against both the original donor and the heirs to whom the estate was limited: 4 Kent's Com. 11 *et seq.;* 4 Cruise Digest, by Greenl. 68, §§ 5, 6, 7; Co. Lit. 19 a (by Thomas, vol. 1, p. 507 *et seq.*). In *Willion* v. *Berkley*, Plowd. 233, Ch. J. DYER said, "The fee simple vested at the beginning, though by issue the donee had power to alien, which he had not before, but the issue was not the cause of having the fee, but the first gift." On p. 250, "Further, as to the common law before the statute, if land had been given to a man and to his heirs of his body begotten, this was not taken to be a full and perfect inheritance, until the donee had issue of his body * * * But (as I take it) it was a *fee simple* presently before issue, but the having of issue made it more full than it was before; for after issue he had power to alien, and thereby to bar the issues and the donor," &c., &c. In the margin it is said, herewith agree 1 Finch 100, 2 Id. 121.

In the case before us the deed, in the granting part, does not purport to convey a fee, either simple or conditional, to Aseneth, but only an estate for life. By the terms of the grant, the estate in her would not be conditional at all. It would not depend on any contingency for its character, or as to her rights in respect to it.

It would be the same in her, whether any of the prescribed after-takers should be born during her life, or in existence at her death or not. No fee of any kind having been conveyed to her, there would be no quality of estate existing in her on which the birth or existence of any of the prescribed sons could operate to invest her with any different title, or incidents of title, from that specifically defined in the grant.

If a conditional fee or an estate tail was created at all by the grant of the deed, it was created in the plaintiff, and not in his

mother. It is in this respect like the case of *Owen* v. *Smyth*, 2 H. Bl. Rep. 594.

This view would seem to be conclusive against the ground of defence now under consideration, unless upon the face of the whole instrument, by construction, the intent was manifested on the part of said Nathaniel to create an *estate tail* or *conditional fee* in said Aseneth, and the instrument itself has the legal requisites for such a purpose. The granting part of the deed expressly gives the land to her during her lifetime, and *to her eldest son living at her decease* and to the successive eldest sons as named. These are mere words of *purchase*, and not of *inheritance*. It is conceded that, in order to constitute an estate tail, the land must pass from the original donee by *inheritance* to the next one entitled,—that is, he must take as *heir* from her, and not as grantee from the party creating the estate,—that she must take and hold the whole estate under the deed, with no limitation on its quality, except as it is affected by the restriction to the specific line of direct heirship.

While it is further conceded that the words of the granting part of the deed would not create such an estate, for want of words of inheritance, it is claimed that resort may properly be had to the *habendum*, upon familiar rules governing the construction of such instruments, and that the word "heirs" therein supplies what is lacking in the granting part of the deed, and shows that the designation of the *eldest sons* in succession is to be construed as equivalent to the expression "the eldest male heirs of her body in succession." We assent to the propriety of the rules invoked, but fail to find them efficacious for the desired purpose. The meaning of the word "heirs" is not confined to its technical import of a *taker by inheritance*. If not affected by other language in the instrument, that sense, and a corresponding legal effect, would be given to it. But when used in connection with other language describing and designating the same subject, the whole is to be taken into consideration, and a meaning is to be assigned to the word according to what shall appear to be its intended sense, within the scope which both law and use have rendered it susceptible of. Now, in the *habendum*, "to her the said Aseneth Ford, and to her heirs as aforesaid," &c., is the expression. There is a slight peculiarity in this that is consistent with, if it does not indicate, the purpose of excluding the idea that the

sons were to take as *heirs* of the mother. The usual form in common deeds conveying an estate of inheritance would be, "to her the said Aseneth, her heirs and assigns," &c., leaving out the words used in this deed, "and to" (her heirs, &c.), which, as used in this case and context, may seem to indicate separable and disconnected interests and rights to be had and held by her, and by her heirs. But "to her and to her heirs *as aforesaid*," shows that the grantor did not intend to change, by enlargement or otherwise, just what was imported by the language in the granting part of the deed, and that "*heirs*" was used as *descriptio personarum*,—as a comprehensive single word, to mean the same thing as, and as a substitute for the specific designation in the granting part, of the persons to take after the said Aseneth. See remarks of Lord THURLOW in *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 219.

It does not import that she or they are to take in any different character, or any different quality of estate, from the character assigned and the estate created in the grant. She is to hold *as aforesaid;* her heirs are to hold *as aforesaid*—she to hold during her lifetime; her eldest son living at her decease to hold next under said grant, and his eldest son, and his eldest son, and so on, to hold in succession.

Under this construction the plaintiff would not take by inheritance from his mother, but in *remainder* after her special estate had terminated. The case, therefore, does not call for a consideration of much of the learning adduced in the argument on the subject of *estates tail* under the common law, as affected by the statute *de Donis*, and the system, which, in process of time, came into existence, of barring entails by fine or common recovery, and as affected by the statutes, constitutions, and adjudications in this and other states of the Union.

II. In view of such construction of the deed, for the purpose of defeating title in the plaintiff under it, it is claimed that the defendants are entitled to impeach its validity, for the reason that it was never delivered by the grantor.

As already stated, Nathaniel Spear kept this and the other deeds to said several children up to the time of his death, and the day after his death his son and subsequent administrator found said deeds among his father's papers, and he then delivered them to the respective grantees named therein, in the presence of the

widow and some of the heirs, none of whom objected, and none of the heirs nor the administrator have ever questioned the validity of said deed to Aseneth.

The case shows that directly, and in due course of law, the estate of said Nathaniel was settled, and distribution made of it between his several children, and therein the whole of his real estate of which he died seised was appraised; the parcels conveyed by said deeds were appraised and were reckoned as advancement to each of the grantees respectively, and said grantees were made equal to the other children by apportioning his other real estate between all his children in parcels to make the value to each equal. In doing this, $3\frac{1}{2}$ acres were set off to Aseneth, valued at $27.33. A like quantity and value was set off to Jacob Spear. These parcels, with said advancements, made to them $657.33 each. To each of the other children other parcels of land of the value of $657.33 were set off. Each took and held the respective parcels under said deeds and the apportionment thus made by the Probate Court. Now, it will be noticed that Aseneth and Jacob, to whom said deeds of Nathaniel had been delivered, did not take the land described in said deeds under and by virtue of said apportionment, but under and by virtue of the deeds themselves, which were treated by all the parties interested in the estate of said Nathaniel as having already taken effect to invest said Aseneth and Jacob with the title to said respective parcels described therein. *Advancement* implies property already vested in and owned by the party advanced. Said $3\frac{1}{2}$ acres apportioned to each of them, and the larger parcels apportioned to the other brothers who had not been advanced, were held by each respectively by virtue of and under said apportionment. Thus their respective rights accrued, and, as between themselves, have always been asserted, recognised, and acted on.

It is clear, then, that it would not be allowable for Aseneth herself to deny the valid delivery of said deed to her. She treated it, and all interested treated it as giving her a valid title from the time of its coming into her hands. She took possession under it, and held such possession for nearly a year before said apportionment by the Probate Court was made; she having taken possession in the spring of 1826, and said apportionment not having been made till the 15th of March 1827. Her title, then,

to the land in question clearly accrued to her under and by virtue of that deed, and she held and occupied under it till 1829, when she conveyed by deed of warranty in fee to Brown, who entered and occupied thereunder till he conveyed by like deed; and the land has passed by like deeds successively to the defendants. Neither she, nor Brown, nor any one in the chain of title, nor the defendants, have ever claimed by virtue of any other paper title; nor by any other title only such as may have been acquired by possession under *color* given by said deeds; and the defendants now claim, as one ground of defence, by a title acquired by adverse possession under *color of title* given by said deed of Aseneth to Brown.

Now, it is clear that that deed of Aseneth to Brown conveyed only the title and quality of estate that she had; and the deed by which such title and estate in her were created being on record, executed with all due formality, would be notice to all the world of the estate which she held and could convey, and so would preclude any ground to a subsequent grantee for asserting any fraud upon him in this respect, so far as the import and apparent validity of the deed is concerned, whatever might be his rights upon the covenants of warranty in the deed taken by him. By treating the deed of Nathaniel to Aseneth as valid to secure to her, and to them, all the title and estate that it purported to convey to her, and, through her whole life, from 1826 to 1865, having held and enjoyed the premises under the rights which she thus acquired, as against all persons interested in the estate of said Nathaniel, it would seem not allowable now for the defendants to assert the invalidity of said deed for want of valid delivery, against a party entitled by said deed to the premises as an estate in remainder, upon the termination of the life estate created in Aseneth by said deed.

In thus holding upon the case before us, we are not to be understood as deciding the question very much discussed in the able arguments of counsel, and ruled in many of the cases cited, whether the defendants might not set up a title in said Aseneth superior to and independent of the deed in question. In this case no such title is averred, or attempted to be shown. We therefore leave that question untouched.

A question made as to the validity of the proceedings of the Probate Court in making said apportionment and distribution of

the estate of said Nathaniel between his children, we regard as settled and quieted by lapse of time.

III. The defendants claim that they have a good title as against the plaintiff by adverse possession.

This subject presents itself for consideration in two aspects:— 1st. Have the defendants and those under whom they hold been in *adverse* possession to the plaintiff? 2d. Has the plaintiff been in such a position, in the view of the law, that he could assert title and right of possession in himself?

Under the first aspect, it is to be noticed "that the defendants, for the purpose of showing color of title to said premises, gave in evidence the deed of warranty from said Aseneth to Brown, dated May 5th 1829, and it appeared that Brown went into possession immediately after buying of said Aseneth, and Brown and his grantees have been in possession ever since."

Again: "The defendants further gave evidence tending to show that Brown went into possession of the demanded premises at the time he took his deed from said Aseneth, claiming to own the fee of said premises, and that he and his grantees have ever since been in possession of said premises, claiming to own them, and purchased them, supposing at the time of the purchase that they were getting a good title in fee." Again: "There was no evidence that said Brown, or any of his grantees, had ever notified the plaintiff, or any one else, that they claimed the land adversely to the plaintiff, or adversely to their deed, or under their deed, except what is to be implied from taking it and putting it on record."

These extracts from the bill of exceptions show that Brown and his grantees entered under the deed of Aseneth to Brown, and claimed under that deed throughout. This is manifest by force of the statements themselves, as well as by the legal intendment, from giving the deed in evidence to show *color of title.* The showing of color is a technical form of saying that the party claims to have entered and held under the deed by him presented. In this case the idea is conclusively excluded that Brown, or any of his grantees, ever claimed to anybody to hold in any other right than that created by said deed to Brown, and from him to his successors in the title. To what, then, shall the character of the entry and possession by him and his successors be referred? It seems to us to present a strong case for the application of the

principle stated and applied in *Brooks* v. *Chaplin*, 3 Vt. R. 281, in which case the plaintiff made title by deeds from Phelps through Smith, which had been on record for many years. In June 1828 the defendant entered and commenced improvements on the premises, which were then wild, and continued in possession till ejected by that suit. In October 1828 the defendant took a quit-claim deed of the premises of the heirs of said Phelps, who had deceased. It was urged for the defendant that, as his possession commenced before he took his quit-claim, or proved to have been in communication with his grantors for the purchase, he had a right, on the failure of that title, to rest upon his antecedent possession, and put the plaintiff on the proof of a perfect title in himself. It was held that the defendant's possession before he took said deed became merged in the supposed title acquired by the purchase. ROYCE, J., said: "The defendant having no right of his own, admitted that of the heirs and took shelter under it. And this admission cannot now be revoked by him for the purpose of acquiring greater privileges at the trial in the character of a mere trespasser, than he is entitled to claim in that of purchaser." So it may be said in this case; the defendants having no right except in virtue of a possession taken and held under Aseneth Ford, by taking possession under her, admitted her right as it existed and was shown by the record, and cannot now be permitted to ignore and repudiate the character of the possession which they thus held, and to now assert, as giving them a title against the plaintiff, a possession without right and as mere trespassers. See Adams on Eject. (ed. 1821) 47 *et seq.* and notes.

The defendants, then, were holding under the deed from Aseneth to Brown, and of course were holding according to the legal effect of that deed. That deed took effect upon, and conveyed the title and estate which the grantor had in the premises conveyed, and that was an estate for her life, created by the deed of her father to her, remainder to the plaintiff and the successors named. Now, the possession under such a title was not *adverse* to the plaintiff, for the reason that it was perfectly consistent with his title and right under the same deed from which said Aseneth and her grantees derived their title and estate. The deed of said Nathaniel Spear to Aseneth, being duly recorded and apparently valid, was notice to all subsequent holders of the real state of

the title and interest both of said Aseneth and the plaintiff; and Brown and his grantees stand charged, so far as the plaintiff is concerned, with knowledge of his title and estate, and cannot now be permitted, by virtue of acts that were entirely consistent with the plaintiff's title, and in no manner indicated any claim adverse to it, to assert that the deeds of Aseneth to Brown and of him to successive grantees, and the possession under said deeds, have been adverse to the plaintiff's title and estate.

It may be further remarked that the plaintiff stands upon the deed of Nathaniel Spear to his mother, Aseneth, recorded January 26th 1826, which then and thenceforward became and was fully operative, both to create and establish his title and estate, and to notify all persons coming into the chain of title, or obtaining any interest in the property, just what his title and estate were. Standing thus, he is entirely unaffected by records of subsequent conveyances to which he was not a party. He is not chargeable with notice and knowledge that the defendants were claiming a title in fee, because his mother had given a warranty deed in fee to Brown, and from Brown the property had been conveyed by like successive deeds to the defendants, and all of said deeds had been duly recorded: *Leach* v. *Beattie*, 33 Vt. R. 195.

Upon this aspect, then, the case stands thus: The defendants entered under a claim of title derived by the deed of Aseneth Ford to Brown, and possession has ever been held under that claim; that deed conveyed only an estate for the life of said Aseneth; the plaintiff held an estate in remainder in the premises after said life estate; he had no notice nor knowledge of any claim as against his title and estate; none has been made; the possession has been consistent with his title. We think he has not lost his title by *adverse* possession.

Under the second aspect it is sufficient to remark, that if the plaintiff had known that the defendants and their predecessors in the occupancy, were claiming to hold and occupy adversely to his title, he could not be injured by it, for the reason that he could not assert his title as against their possession and claim during the life of his mother, which terminated in 1865. If she had not conveyed, she could have held during her life. Having conveyed her title and interest, her grantees could enjoy the same with all the rights and immunities that appertained to her.

The claim of the defendants to be allowed for improvements made during their possession, by way of offset or recoupment to the *mesne* profits to which the plaintiff is entitled, was properly disposed of by the County Court.

The judgment for the plaintiff is affirmed.

The District Court of the United States for the Western District of Michigan.

THE UNITED STATES *v.* JAMES H. FAIRCHILDS.[1]

The 12th and 13th sections of the Act of Congress, approved July 4th 1864, limiting the compensation of agents and other persons for making and causing to be executed the necessary papers to establish a claim for pension, bounty, or other allowance before the pension office, to ten dollars, and declaring it to be a high misdemeanor for any such person to demand or receive any greater compensation than ten dollars for his services under the Pension Act, &c., &c., is not unconstitutional. Congress had power to pass an act with such provisions, under those clauses of the Constitution which declare that "Congress shall have power to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States," provided, in the judgment of Congress, such provisions were thus necessary and proper at the time they were adopted.

FAIRCHILDS was indicted at the May Term, under sections 12 and 13 of the Act of Congress approved July 4th 1864, 13 Stat. at Large, p. 389.

The 12th section limits the compensation to be received by an agent or other person, for making out and causing to be executed the necessary papers to establish a claim for pension, bounty, or other allowance before the pension office, to $10.

Section 13 declares it to be a high misdemeanor for such agent or other person to demand or receive any greater compensation for his services under the Pension Act referred to than is prescribed in section 12, and a like offence to contract or agree to prosecute any claim for a pension, bounty, or other allowance under the act, on the condition that he receives a percentage upon any portion of the amount of such claim, or to wrongfully

[1] We are indebted for a copy of the opinion in this case to Hon. S. L. WITHEY. —EDS. AM. LAW REG.